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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

KENT E. KIMBERLY, M.D., an individual,

Plaintiff,

SHARP REES-STEALY MEDICAL GROUP  
INC. GROUP LONG TERM DISABILITY  
INSURANCE PLAN

## Defendants.

CASE NO.: 08 cv 0157 JLS (POR)

PLAINTIFF'S OPPOSITION TO  
DEFENDANT SHARP REES-STEALY  
MEDICAL GROUP INC. GROUP LONG  
TERM DISABILITY INSURANCE PLAN'S  
MOTION TO STRIKE PURSUANT TO  
FED.R.CIV.P. 12(f) OR, IN THE  
ALTERNATIVE, MOTION TO DISMISS  
PURSUANT TO FED.R.CIV.P. 12(b)(6)

Date: July 17, 2008  
Time: 1:30 PM  
CTRM: 6 (Third Floor)  
JUDGE: Honorable Janis L. Sammartino

Plaintiff **KENT KIMBERLY, M.D.**, ("Dr. Kimberly") submits his Opposition to Defendant Sharp Rees-Stealy Medical Group Inc. Group Long Term Disability Insurance Plan's Motion to Strike Pursuant to Fed. Rule Civ. Pro. 12(f), or, in the Alternative, Motion to Dismiss Pursuant to Fed. Rule Civ. Pro. 12(b)(6).

Abbreviations: Sharp Rees-Stealy Medical Group Inc.: "SRSMG." Hartford Life and Accident Insurance Company: "Hartford." The Group LTD Insurance Plan: "LTD Plan."

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I.

## **INTRODUCTION**

3        This is an action under the Employment Retirement Income Security Act of 1974 (“ERISA”)  
4        seeking group long term disability (LTD) benefits under a group disability policy issued by Hartford,  
5        effective September 1996, covering the employees of SRSMG. It provides SRSMG physicians with own-  
6        occupation coverage at 60% of their predisability earnings after a 90-day “elimination period”. Dr.  
7        Kimberly, an eye surgeon employed by SRSMG, earning an average of \$12,214 per month when he  
8        became disabled on and after May 31, 2001, was insured under Hartford’s policy. Dr. Kimberly’s  
9        symptoms were originally (mis)diagnosed as resulting from major depression, giving him the diagnosis  
10       of Major Depressive Disorder (MDD), although none of the innumerable antidepressants that were tried  
11       achieved beneficial effect. Finally he fell asleep at the wheel and crashed into a median, after which  
12       investigation into sleep disorders was started and he was diagnosed with severe Obstructive Sleep Apnea  
13       Syndrome (OSAS). A basic CPAP nasal mask was essentially ineffective in improving his OSAS  
14       symptoms. Believing nothing else would help, he underwent a brutal one-month course of 16 bilateral  
15       Electroconvulsive Shock Treatments (bilateral ECT) which carry procedural risk of memory loss and  
16       cognitive impairment ranging from short term to permanent. Unfortunately, he was left unmonitored  
17       and/or sent home unmonitored during recovery from anesthesia. By the 16<sup>th</sup> treatment, he had severe  
18       memory difficulties. He was diagnosed with Cognitive Disorder; Amnesic Disorder, has significant short  
19       term and long term memory deterioration, loss and impairment, significant attention, comprehension  
20       impairment resulting from prolonged oxygen deprivation from episodes of severe OSAS together with  
21       the (unmonitored post-anesthesia) multiple ECT treatments. Due to the original diagnosis of MDD,  
22       Hartford categorized his disability claim as “mental illness”, but steadfastly refused to correct or change  
23       it after the severe OSAS was discovered to be the origin of his disabling symptoms, or after the end of  
24       the bilateral ECT which left him with apparently permanent cognitive deficits and short term memory  
25       problems. He was medically unsafe to perform his occupation as an eye surgeon. On April 29, 2004,  
26       received May 3, 2004, Hartford communicated a termination of disability benefits citing the 24-month  
27       mental illness provision. Plaintiff appealed Hartford reasons for denial. Hartford commissioned  
28       University Disability Consortium (UDC) with which Hartford routinely works, to arrange for reviews of

1 various of Plaintiff's records. Plaintiff requested copies of the new reviews and an opportunity to  
 2 comment on or respond to any new assertions or arguments contained in them prior to Hartford  
 3 conducting its own final review. Hartford refused, receiving the new reports, one of which was 27 pages  
 4 in length and making a variety of new assertions, assessments arguments and/or conclusions, several days  
 5 after which Hartford sent Plaintiff it's "final" denial —relying on the new evidence it commissioned—  
 6 and advising Plaintiff his "administrative remedies" were now exhausted and his file closed. Plaintiff's  
 7 counsel has seen this maneuver by Hartford repeatedly in case opinions and as communicated by other  
 8 attorneys known to Plaintiff's counsel. Hartford was told in 2002 in an amicus brief by the Secretary of  
 9 Labor, who participated in another disability benefits case Plaintiff's counsel litigated, that the failure by  
 10 Hartford to provide the claimant with an opportunity to review and comment on or respond to all the  
 11 evidence, at a time while it was still meaningful during the administrative process to do so, violates  
 12 ERISA's full and fair review requirements and is a breach of fiduciary duty. Plaintiff has and continues  
 13 to be unable to perform his occupation as an eye surgeon, and will never be able to practice as an eye  
 14 surgeon again given his cognitive problems. Plaintiff filed his action under ERISA, seeking benefits  
 15 against the LTD Plan under (a)(1)(B) and any other equitable relief the court finds, after hearing all of  
 16 the evidence in the case, is "appropriate." this includes but is not limited to declaratory relief as to  
 17 breaches of fiduciary duty or injunctive relief—not injunctive relief to pay the benefits, as that would be  
 18 duplicative of an (a)(1)(B) remedy—but injunctive relief to enjoin any fiduciary or agent of the LTD Plan  
 19 that performs handling or investigation of Plaintiff's claim in the future once Plaintiff's claim and  
 20 benefits are reinstated (including Hartford) from refusing to provide Plaintiff with all records related to  
 21 his claim as defined under the regulations at 29 C.F.R. 2560.503-1(m). Injunctive relief is not available  
 22 under (a)(1)(B), and the award of past benefits will not prevent or remedy such violations in the future.

23 **II.**

24 **LEGAL STANDARD**

25 Regarding Motion to Strike: Plaintiff has alleged nothing that is "immaterial, impertinent or  
 26 scandalous" in his Complaint. Plaintiff has alleged events related to his claim and exhaustion of  
 27 administrative remedies that transpired chronologically, which does not constitute improper  
 28 'redundancy.' While Defendant seems to recognize that all of the allegations are inextricably intertwined

1 with facts and procedures related to Plaintiff's claim and Hartford's handling of it, and thus none of it  
 2 "immaterial," the crux of Defendant's motion to strike is Defendant's contention that certain of the  
 3 "requested relief . . . [ ] is not recoverable as a matter of law" and thus the court "should strike prayers  
 4 for relief where the relief sought cannot be awarded."

5 Regarding Motion to Dismiss: Defendant's motion to dismiss is completely misplaced. A  
 6 motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a claim. Navarro v. Block, 250  
 7 F.3d 729, 732 (9th Cir. 2001). Because the focus of a 12(b)(6) motion is on the legal sufficiency, rather  
 8 than the substantive merits of a claim, the Court ordinarily limits its review to the face of the complaint.  
 9 See Van Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002). Generally, dismissal  
 10 is proper only when the plaintiff has failed to assert a cognizable legal theory or failed to allege sufficient  
 11 facts under a cognizable legal theory. See SmileCare Dental Group v. Delta Dental Plan of Cal., Inc., 88  
 12 F.3d 780, 782 (9th Cir. 1996); Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988);  
 13 Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984). Further, dismissal is  
 14 appropriate only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of a  
 15 claim. See Abramson v. Brownstein, 897 F.2d 389, 391 (9th Cir. 1990). In considering a 12(b)(6) motion,  
 16 the Court accepts the plaintiff's material allegations in the complaint as true and construes them in the  
 17 light most favorable to the plaintiff. See Shwarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000).;  
 18 Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); Adams v. Johnson, 355  
 19 F.3d 1179, 1183 (9th Cir. 2004) ("All allegations and reasonable inferences are taken as true, and the  
 20 allegations are construed in the light most favorable to the non-moving party, but conclusory allegations  
 21 of law and unwarranted inferences are insufficient to defeat a motion to dismiss." (internal quotations  
 22 omitted)). "Dismissal is proper under Rule 12(b)(6) if it appears *beyond doubt* that the non-movant can  
 23 prove no set of facts to support its claims." *Id.* A district court's dismissal of a complaint without leave  
 24 to amend is reviewed de novo and would be found to be improper "unless it is clear that the complaint  
 25 could not be saved by any amendment." Livid Holdings Ltd. v. Salomon Smith Barney, Inc., 416 F.3d  
 26 940, 946 (9th Cir. 2005).

27 Plaintiff has properly and more than sufficiently pleaded a claim for payment of own-occupation  
 28 (Plaintiff was an eye surgeon) disability benefits under ERISA § 502(a)(1)(B). However, the violations

1 and wrongs that Plaintiff has alleged cannot be completely remedied simply by reinstatement of  
 2 Plaintiff's claim together with an award of past benefits, interest thereon and § 502(g) attorney's fees and  
 3 costs. As explained below, Plaintiff has also more than sufficiently pleaded facts that would permit the  
 4 court to impose other equitable relief as "appropriate" under § 502(a)(3), depending on the Court's  
 5 ultimate findings on various facts and issues involved in this matter.

6 Whether or not the Court *ultimately* determines that the wrongs and violations alleged can be  
 7 remedied only in part under (a)(1)(B) but not in whole as the Court deems appropriate without also  
 8 awarding certain relief that is available through (a)(3) (including declaratory and injunctive relief) is not  
 9 the question presently, because the parties are at the initial pleading stage. Therefore, the Court should  
 10 not strike or dismiss any prayer for relief alleged to be available under (a)(3) at this time.

11 After review of Plaintiff's points and authorities and supporting request for judicial notice of the  
 12 Secretary of Labor's position about Hartford's prior violations of its disclosure duties, which it has  
 13 knowingly and purposefully repeated in this case, if the Court determines that injunctive relief imposed  
 14 against the LTD Plan, alone, is sufficient (since it would require that any fiduciary or administrator acting  
 15 on behalf of the Plan comply with said injunctive relief), then the Court would not need to grant leave  
 16 to Plaintiff to amend the Complaint to specifically name Hartford, as a plan administrator and plan  
 17 fiduciary, as a Defendant.

18 Alternatively, if the Court determines that any injunctive relief against the Plan (through which  
 19 Hartford acts) would not sufficiently bind Hartford or any future claim fiduciary acting on behalf of the  
 20 LTD Plan, to prevent it from repeating its fiduciary breaches in the future during its claim administration  
 21 of Plaintiff's continuing LTD claim, and that Plaintiff should amend his complaint to name Hartford  
 22 individually, then the Court should grant Plaintiff leave to amend to name Hartford as a Defendant under  
 23 (a)(3).

24 This memorandum presents the authorities showing that 1) Hartford as a plan fiduciary, sole claim  
 25 administrator, and a plan administrator by the Regulations (29 C.F.R. 2560.503-1) can be a proper named  
 26 Defendant on an (a)(3) claim; 2) an (a)(1)(B) benefits claim against the LTD Plan can coexist with an  
 27 (a)(3) claim against Hartford. In any event, it cannot be disputed that Hartford is the entity that is  
 28 actually defending this action on behalf of the LTD Plan.

III.

## **ARGUMENT**

A. DEFENDANT'S CONTENTION THAT PLAINTIFF CANNOT BOTH  
OR ALTERNATIVELY SEEK ERISA § 502 (a)(1)(B) and § 502(a)(3)  
RELIEF IS ERRONEOUS

29 U.S.C.S. § 1132, ERISA § 502, titled “Civil Enforcement” states:

**(a) Persons Empowered to Bring Civil Action** — A civil action may be brought —

(1) by a participant or beneficiary --

(A) for the relief provided for in subsection (c) of this section [penalty section], or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan ;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 [§409] [on behalf of a plan] ;

(3) by a participant, beneficiary or fiduciary

(A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or

**(B)** to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan. . . .

[bold/underline added]. Plaintiff became disabled on and after September 7, 2001. The applicable regulations of the Secretary of Labor are the new regulations which took effect for claims filed on and after January 1, 2001.

Defendant admits that the payment of LTD benefits under a Plan are governed by ERISA § 502(a)(1)(B), as Plaintiff has alleged. However, certain declaratory or injunctive relief is simply not available under 502(a)(1)(B). As to (a)(1)(B) relief, it is not disputed that the *LTD Plan* is the ‘entity’ that is liable for the actual payments of the *benefits* rather than the individual fiduciary itself. That, however, is an argument that makes no technical difference when the plan benefits are simply the benefits paid under an insurance policy issued by Hartford, payable from Hartford’s own assets. As to the applicable “terms” of the Plan or policy, such terms are obviously determinable during the (a)(1)(B)

1 action since it allows Plaintiff to recover benefits due him under the terms of the plan and to enforce  
 2 rights per the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.  
 3 Where insured by an insurance company, the insurance proceeds are obviously paid by the insurance  
 4 company from its own assets.

5 Defendant asserts that Everhart<sup>1</sup> bars a plaintiff from seeking relief against a plan fiduciary,  
 6 including a claim fiduciary (such as Hartford), which performs all of the claim fiduciary functions for and  
 7 on behalf of the LTD Plan. This is incorrect. Everhart would bar Plaintiff from suing Hartford to recover  
 8 additional benefits *under (a)(1)(B)*. But Plaintiff has not sued Hartford under (a)(1)(B) and does not  
 9 allege that Hartford is the responsible entity under (a)(1)(B). The Plan is. However, what the court  
 10 actually said in Everhart was, “a money judgment for an action brought under § 1132(a)(1)(B) may be  
 11 enforced “only against the plan as an entity and shall not be enforceable against any other person unless  
 12 liability against such person is established in his individual capacity.” *Id.* § 1132(d)(2).” Everhart at 753.  
 13 It also states, “. . . [P]recedent of this circuit, and of every other circuit that has expressly considered the  
 14 issue, [holds] that § 1132(a)(1)(B) does not permit suits against a third-party insurer to recover benefits  
 15 *when the insurer is not functioning as the plan administrator.*” *Id.* at 756. In any event, double monetary  
 16 recovery (benefits from the Plan; additional like-benefits from the insurance company) are not  
 17 recoverable —nor does Plaintiff seek double monetary recovery. The proper entity from which Plan  
 18 benefits are to be obtained is the Plan.

19 The year following Everhart, the Northern District of California (Rosenburg v. IBM, 2006 U.S.  
 20 Dist. LEXIS 41775, 38 Employee Benefits Cas. (BNA) 1202 (N.D. Cal. June 12, 2006)), discussing two  
 21 other cases, noted that claims related to “record keeping” “could properly be brought” under 502(a)(3),  
 22 citing Farmers , 2005 U.S. Dist. LEXIS 42706, 2005 WL 1972565 at \* 3 (noting the Supreme Court's  
 23 decision in Varity, which described § 502(a)(3) as a ‘kind of a catchall’ ‘providing appropriate equitable  
 24 relief from any statutory violation for injuries caused by violations that § 1132 does not elsewhere  
 25 adequately remedy.’” Varity Corp. v. Howe, 516 U.S. 489, 511, 116 S.Ct. 1065, 134 L.Ed. 2d 130 (1996).

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 27 <sup>1</sup>Everhart v. Allmerica Fin. Life Ins. Co., 275 F.3d 751, 756 (9th Cir. Cal. 2001), cert denied,  
 28 536 U.S. 958, 122 S. Ct. 2662, 153 L. Ed. 2d 836 (2002).

1 Rosenburg quoted the explanation by the Farmers court:

2 plaintiffs should be able to maintain their recordkeeping claim at least at  
 3 that stage of the proceedings. It reasoned that: “[w]hile other remedies  
 4 ultimately may exist and [\*22] be appropriate, the pleading stage is not the  
 5 proper stage at which to make that determination.” Id. It noted that “if  
 6 [the employer] has in fact violated ERISA with respect to the present  
 7 plaintiffs by failing to keep proper records, then an injunction requiring  
 8 [the employer's] compliance with ERISA may be an appropriate remedy.”  
 9 Id. (citing Varity, 516 U.S. at 515).<sup>2</sup>

10 Defendant also argues that Plaintiff lacks standing to seek other appropriate equitable relief,  
 11 including injunctive relief under (a)(3), on behalf of other plan participants. Defendant overstates  
 12 Plaintiff's claim. First, Plaintiff seeks only his benefits and an application of the terms of his plan under  
 13 (a)(1)(B), not any other participants' benefits, and seeks “other appropriate equitable relief” to prevent  
 14 the same administrator's fiduciary breaches in the future, if and when the Court reinstates his claim and  
 15 grants past-benefits. According to Varity, Plaintiff may seek such individual relief under (a)(3). Varity,  
 16 516 U.S. at 515. (ERISA beneficiaries are authorized to sue for “‘appropriate’ equitable relief” for breach  
 17 of fiduciary obligations where ERISA does not “elsewhere provide[] adequate relief for a beneficiary's  
 18 injury.”) If such relief sought by Plaintiff should inure to the benefit of other claimants under the LTD  
 19 Plan, that is beside the point. Plaintiff's suit is not brought for the reason of specifically seeking relief  
 20 on behalf of any other participant. But Plaintiff may nevertheless seeks declaratory relief that a plan  
 21 administrator of the Plan (the plan administrator which was subject to the requirements of, and was  
 22 responsible for compliance with the claims regulations at 29 C.F.R. 2560.503-1 —i.e., Hartford)  
 23 breached its fiduciary duties and is subject to being enjoined from further such breaches.

24 While Varity made available individual relief through (a)(3) for the first time, the decision was  
 25 limited in scope in that it does not contemplate either §502(a)(1)(B) or §502(a)(3) claims as mutually  
 26 exclusive. Defendant would have this Court dismiss Plaintiff's §502(a)(3) allegations and prayer for  
 27 other equitable relief that the court ultimately determines may be “appropriate” merely because he also

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28 <sup>2</sup> The Rosenberg court also discussed Delucchi v. Life Ins. Co., 2005 WL 146902 (N.D. Cal.  
 29 2005), where the plaintiff alleged both a claim for benefits under § 1132(a)(1)(B), and a claim for  
 30 breach of fiduciary duty under § 502(a)(3), and because Delucchi had properly stated a claim for  
 31 benefits, she “already had a remedy under § 1132(a)(1)(B) for [that] claim for benefits.” —i.e., she  
 32 did not need a claim under (a)(3) for benefits. Id. at \* 1. That is not what Plaintiff in the instant  
 33 action has alleged.

1 brings a §502(a)(1)(B) claim for his benefits, suggesting that these two sections are mutually exclusive  
 2 under Varity. This is simply an not accurate interpretation of Varity. The Supreme Court did not grant  
 3 *certiorari* in Varity to review that issue, let alone make such a holding. Varity at 491.<sup>3</sup>

4 Again, Varity held that individual beneficiaries harmed by an administrator's breach of fiduciary  
 5 duties may properly seek relief from the administrator under §502(a)(3). *Id.* at 516 U.S. at 492. As  
 6 mentioned above, the Supreme Court commented in dictum that §502(a)(3) is a "catchall," designed to  
 7 provide a "safety net, offering appropriate equitable relief for injuries caused by violations that §502  
 8 does not elsewhere adequately remedy." *Id.* at 512. This language was designed in anticipation of benefit  
 9 claims inappropriately "repackaged" as fiduciary breach claims. *Id.* at 512-515. It does not bar remedies  
 10 for fiduciary breach where benefits are also at issue and where (a)(1)(B) provides the benefits but  
 11 provides no remedy for such fiduciary breaches.

12 In its discussion of potentially "repackaged claims," the Varity Court however never specifically  
 13 barred concurrent §502(a)(3) and §502(a)(1)(B) claims within the same suit. *Id.* Several *amicus curiae*  
 14 briefs were filed in Varity to flesh out the allegedly dire circumstances of the potential repackaging of  
 15 claims. The Varity Court dismissed these concerns, stating "[t]he concerns that *amici* raise seem to us  
 16 unlikely to materialize." *Id.* at 514. In other words, it is not necessary to seek an injunction under (a)(3)  
 17 to pay benefits under the Plan when the remedy of benefits under the plan is taken care of through  
 18 (a)(1)(B). While it is possible these sections *may* involve duplicative facts when pled within one  
 19 complaint, this is not the rule announced in Varity. In fact, there is no language in Varity that creates the

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20       <sup>3</sup> In Varity, the only thing the Plaintiff's were seeking were pension benefits, but because they  
 21 had been fraudulently duped by employer misrepresentations to transfer their employment to a new  
 22 subsidiary and thereby become participants in the assetless subsidiary's Plan, no "benefits" were  
 23 available from that plan, so a claim under 502(a)(1)(B) would afford them no relief. The court found  
 24 that *individual* equitable relief was available through 502(a)(3), and although it was unavailable in the  
 25 form of benefits from the assetless plan, the court fashioned "appropriate equitable relief" by  
 26 reinstating the employees into their original plan. The 'benefits' were provided by the original plan.  
 27 In fact, two factors in particular appear to have swayed a majority of the Supreme Court to read the  
 28 statute to authorize claims for individual equitable relief against fiduciaries. One is above. The  
 second is that the "plain language" of the statute works against a strict construction of ERISA. The  
 majority pointed out, "the literal language of the statute" authorized "appropriate equitable relief" for  
 "any" statutory violation. Varity, 116 S.Ct. at 1077-78, 1079. In applying ERISA's intentionally  
 broad remedial scheme, the court must be mindful of ERISA's basic purposes, which are "broadly  
 protective" of participants. e.g. John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 114  
 S.Ct. 517, 524 (1993). To read an "either"/"or" into § 502 [i.e., either (a)(1)(B) or (a)(3), when the  
 claim for relief itself is different], thwarts the underlying "broadly protective" policy.

rigid, *per se* rule that Defendant suggests. Rather the Varity court only instructs that in order to discern between “appropriate” versus *duplicative* §502 claims (see *duplicative*, mentioned at lines 16-18 above), a lower court will ultimately need to determine whether further equitable relief in a case is “appropriate.” *Id.* at 512-515. By no means did the court explicitly or implicitly rule that a plaintiff could not bring concurrent §§502(a)(1)(B) and (a)(3) claims.<sup>4</sup> The Supreme Court expressly rejected such theory in 2002. The Supreme Court explained at footnote 5, in Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 221, 151 L. Ed. 2d 635, 650, 122 S. Ct. 708, 719 (2002):

Varity Corp. v. Howe, 516 U.S. 489 (1996), upon which petitioners rely, is not to the contrary. In Varity Corp., we explained that 502(a)(3) is a catchall provision that acts as a safety net, offering appropriate equitable relief for injuries caused by violations that 502 does not elsewhere adequately remedy. *Id.*, at 512. Thus, we concluded that 502(a)(3) authorizes lawsuits by beneficiaries for individualized equitable relief for breach of fiduciary obligations, notwithstanding the petitioners argument that such relief is not appropriate because 502(a)(2) and 409 of ERISA specifically address liability for breach of fiduciary duty and preclude individualized relief. *Id.*, at 507 515. In Varity Corp., however, it was undisputed that respondents were seeking *equitable* relief, and the question was whether such relief was appropriate in light of the apparent lack of alternative remedies. *Id.*, at 508. Varity Corp. did not hold, as petitioners urge us to conclude today, that 502(a)(3) is a catchall provision that authorizes *all* relief that is consistent with ERISA's purposes and is not explicitly provided elsewhere. To accept petitioners argument is to ignore the plain language of the statute, which provides fiduciaries with only equitable relief.

<sup>4</sup>Since an *individual* claim to recover relief for a *breach of fiduciary duty* can only be brought under ERISA § 502(a)(3), the only monetary relief that can be recovered, if it doesn't fit within 502(a)(1)(B) must, according to Varity, fit within § 502(a)(3)'s category of "appropriate equitable relief" which Varity was able to fashion. For instance, equitable awards may include restitution, disgorgement, "make whole" injunctions, and other relief, which although classified as equity, may amount to an award of money, such as in the case of "interest" awarded on unpaid benefits as a form of preventing unjust enrichment to the administrator and "making the Plaintiff whole".

The Varity scenario is completely dissimilar to Dr. Kimberly's instant action. He is seeking his benefits –the only monetary relief– from the Plan under (a)(1)(B). Frankly, as a matter of common sense, as mentioned above, a Plaintiff simply would not resort to 502(a)(3) in a claim for benefits under some “equitable theory” if he had a benefits source readily available under 502(a)(1)(B). The reason for this is that source of benefits under 502(a)(1)(B) are usually readily apparent and available (i.e., from a policy or self–funded Trust]. If they are sought under (a)(3), the reason is because they are not available because the employee through some error was never made a participant, or was duped into transferring employment (like in Varity), and therefore could only be granted equitable relief that might result in reinstatement or reinstatement that would ultimately produce the benefits coverage sought. Simply put, a close reading and thorough understanding of Varity does not stand for what Defendant urges. If it did, such restriction would be readily apparent from the face of the statute. It is not.

1           In Black v. Long Term Disability Ins., Milwaukee World Festivals, Inc. (& Standard Ins. Co.),  
 2 373 F.Supp.2d 897 (E.D.Wisc. 2005) (6/21/05), the employee alleged that defendants wrongfully denied  
 3 benefits to her and that the administrator breached its fiduciary duty to her by failing to properly review  
 4 her claims. The court held that the administrator, as in the Ninth Circuit, was not a proper party to the  
 5 employee's *(a)(1)(B) claim* (because the only proper defendant to such a claim was the Plan<sup>5</sup>), but that  
 6 the employee's breach of fiduciary duty claim was not subject to dismissal because, whether or not an  
 7 ERISA plaintiff could not prevail on both, a claim for benefits under (a)(1)(B), and a breach of fiduciary  
 8 duty claim under (a)(3), it was inappropriate to dismiss the (a)(3) claim as duplicative at the motion to  
 9 dismiss stage of a case. The court in Black pointed out that according to the Second Circuit,

10           under Varity Corp., a plaintiff could prevail on both claims but that in such  
 11 case equitable relief pursuant to § 1132(a)(3) would "normally" not be  
 12 appropriate. Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76, 89  
 13 (2d Cir. 2001). The court stated that "ultimately, we believe that the  
determination of 'appropriate equitable relief' rests with the district court  
should plaintiffs succeed on both claims . . . [and that] the district court's  
remedy is limited to such equitable relief as is considered appropriate."  
 14 Id. at 89-90.

15           I need not decide at this early stage of the present case whether plaintiff  
 16 may prevail on both her claim for benefits and her breach of fiduciary duty  
 17 claim. However, even assuming that an ERISA plaintiff may not prevail  
 18 on a claim for benefits under § 1132(a)(1)(B) and a breach of fiduciary  
 19 duty claim under § 1132(a)(3), a district court should generally [\*902] not  
dismiss a § 1132(a)(3) claim as duplicative of a claim for benefits at the  
motion to dismiss stage of a case, and I decline to do so in the present case.  
 I reach this conclusion for several reasons.

20           Black, at 901-902.

21           The reasons given by the Black court include the example,

22           if a fiduciary denied a claim for benefits because of a personal animus  
 23 toward the plaintiff or for some other improper reason but used a plausible  
 24 interpretation to justify its action, the plaintiff should not be barred from  
 25 bringing an action under § 1132(a)(3)." (Citing Jeffrey Lewis & Dan  
 26 Feinberg, "Varity Corp. v. Howe: The Plaintiff's Perspective," 5 No. 2  
 27 ERISA Litig. Rep. 3, 7, June 1996.) The Black court then discussed why  
 a claim for both an (a)(1)(B) remedy (the denied benefits) and (a)(3)  
 remedy should co-exist:

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28           <sup>5</sup>Citing Blickenstaff v. R.R. Donnelley & Sons Co., 378 F.3d 669, 674 (7th Cir. 2004)(citing  
Neuma, Inc. v. AMP, Inc., 259 F.3d 864, 872 n.4 (7th Cir. 2001) and Jass v. Prudential Health Care  
Plan, Inc., 88 F.3d 1482, 1490 (7th Cir. 1996)).

1 In the present case, plaintiff seeks benefits but also alleges that Standard  
 2 violated ERISA regulations and plan terms by engaging in a number of  
 3 improper practices such as permitting claim examiners to decide appeals  
 4 of their own decisions and misclassifying claimants' occupations, and she  
5 seeks injunctions barring such practices. Plaintiff could not pursue these  
6 allegations or obtain appropriate relief in the context of her claim for  
7 benefits. This is so both because of the limited nature of a claim for  
8 benefits and because Standard is no longer a party to that claim. Thus, if  
9 I dismissed her breach of fiduciary duty claim on a Rule 12(b)(6) motion,  
10 I would effectively deny her the opportunity to prove a possibly  
11 meritorious claim. As discussed below, such a result would be  
12 inconsistent both with *Varity Corp.* and with federal pleading rules.

13 Id. at 901-902.

14 The Court corrected Standard's erroneous interpretation of Varity, explaining that, 1) *Varity* "does  
 15 not deal with "pleading" but with "relief"<sup>6</sup>; 2) while equitable relief is "normally" not needed in addition  
 16 to (a)(1)(B) benefits, Varity does not state it is "never" inappropriate<sup>7</sup>; 3) Varity does not overrule the  
 17 federal pleading rules of Fed.R.Civ.P. 8(c) which allow pleading claims "alternatively or hypothetically,  
 18 either in one count . . . or in separate counts" (quoting 8(c)). Id at 902-903. The court then concludes  
 19 that dismissal of an "(a)(3) claim as duplicative at the pleading stage of a case would, in effect, require  
 20 the plaintiff to elect a legal theory and would, therefore, violate Rule 8(c)."

21 The final important reason stated by the court in Black is:

22 Finally, [\*\*14] to interpret *Varity Corp.* as requiring a court to dismiss an  
 23 ERISA plaintiff's breach of fiduciary duty claim prior to developing the  
 24 facts of the case runs counter to one of the bases of the decision -- the  
 25 purposes of ERISA. 516 U.S. at 513 (stating that the statute seeks "to  
 26 protect . . . the interests of participants . . . and beneficiaries . . . by  
 27 establishing standards of conduct, responsibility, and obligation for  
 28 fiduciaries . . . and providing for appropriate remedies . . . and ready access  
 to Federal courts") (quoting ERISA § 2(b)).

29 In 2007, the Northern District of California held that a plaintiff may proceed on both a wrongful  
 30 denial and equitable relief theory if the plaintiff "allege[s] wrongful conduct that, although not affecting

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31 <sup>6</sup> " Varity Corp does not hold that when an ERISA plaintiff alleges facts supporting both a §  
 32 1132(a)(1)(B) and a § 1132(a)(3) claim, a court must or should grant a defendant's Rule 12(b)(6)  
 33 motion to dismiss the latter claim. [\*\*13] Varity Corp. did not deal with pleading but rather with  
 34 relief. 516 U.S. at 515 (stating that "where Congress elsewhere provided adequate relief for a  
 35 beneficiary's injury . . . equitable relief . . . normally would not be 'appropriate'"). Black, at 902.

36 <sup>7</sup> "Further, to the extent that Varity Corp. indicates that duplicative relief is inappropriate, it  
 37 uses the word "normally" not "never." Id. And, as discussed, a court is unlikely to be able to discern  
 38 at the pleading stage of a case both whether the relief provided in § 1132(a)(1)(B) is "adequate" and  
 39 whether the case is a "normal" one. " Black, at 902.

1 all plan participants, does go beyond the mere wrongful calculation of benefits.” Ehrman v. Standard Ins.  
 2 Co., 2007 U.S. Dist. LEXIS 35124, 2007 WL 1288465, \*4 (N.D. Cal. May 2, 2007). Because the  
 3 plaintiff in Ehrman alleged “some form of self-dealing through the intentional adoption of biased claim  
 4 practice and procedures relating to offsets which are systematically designed to increase the financial  
 5 profitability of the Defendant” — an allegation that the court noted could not be remedied by damages  
 6 — the court denied the defendant’s motion to dismiss the concurrent (a)(3) claim.

7 Consistently, the same court in Finkelstein v. Guardian Life Ins. Co. of Am., 2007 U.S. Dist.  
 8 LEXIS 92053 (N.D. Cal. Dec. 5, 2007), after discussing Ehrman, explained:

9 Just so here, Finkelstein has set forth allegations that go above and beyond  
 10 the mere denial of benefits. For example, plaintiff alleges that Guardian  
 11 systematically denies legitimate claims in an attempt to boost profits, [ ]  
 12 unreasonably fails to investigate the basis of their denials of claims, id. [ ]  
 13 and has unreasonably failed to adopt, implement and apply reasonable or  
 14 proper standards for investigating and processing claims, id. [ ]. As in  
 15 Ehrman, “it may turn out to be the case, [\*13] even if Plaintiff ultimately  
 proves a breach of fiduciary duty, that this Court concludes it is not  
 appropriate to provide equitable relief beyond that provided for in §  
 1132(a)(1)(B) under the carefully integrated civil enforcement provisions  
 that Congress enacted in ERISA.” [Ehrman] 2007 U.S. Dist. LEXIS  
 35124, 2007 WL 1288465 at \*5. That determination, however, must be  
saved for a later stage in the proceedings.

16 Here, Plaintiff’s allegations go above and beyond a mere denial of benefits and would warrant  
 17 injunctive relief against any administrator acting through or on behalf of the Plan, including Hartford,  
 18 —or even against Hartford individually if the Court deems it necessary for Plaintiff to amend his First  
 19 Amended Complaint to name Hartford individually for a remedy against Hartford under (a)(3), to prevent  
 20 such violations of ERISA and Plaintiff’s rights under ERISA. (Plaintiff has addressed the requirements  
 21 to obtain injunctive relief separately, below.)

22 Also in 2007, the district court in the Northern District of New York held that alternative claims,  
 23 including the Plaintiff’s suit for benefits under both (a)(1)(B) and (a)(3), can co-exist at the pleading  
 24 stage. Fredericks v. Hartford Life Ins. Co., Services Medical Group., 2007 U.S. Dist. LEXIS 23666  
 25 (N.D.N.Y. March 30, 2007).

26 Similarly, defendants in Aikens v. U.S. Transformer, Inc., 2008 U.S. Dist. LEXIS 19285 (D. Idaho  
 27 Mar. 11, 2008) made the same argument as Defendant makes in the instant case —“that plaintiffs’ claims  
 28 under 29 U.S.C. § 1132(a)(3) fail as a matter of law, because plaintiffs’ claims for benefits pursuant to

1 29 U.S.C. § 1132(a)(1)(B) and for breach of fiduciary duty pursuant to 29 U.S.C. 1132(a)(2) provide the  
 2 exclusive remedy for Plaintiffs' claimed injuries . . . ." Aikens at \*44. The court acknowledged that a  
 3 right to equitable relief under (a)(3) requires the act complained of have been performed by a fiduciary,  
 4 and that it be a breach of fiduciary duty (violating an ERISA-imposed fiduciary obligation), while acting  
 5 in a fiduciary capacity (citing Varity and Mathews v. Chevron Corp., 362 F.3d 1172, 1178 (9th Cir.  
 6 2004). The Aikens court cited footnote 5 in Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S.  
 7 at 221 n.5 (2002) (quoted at page 9 above), and Varity Corp., 516 U.S. at 512 and, like all cases  
 8 discussing Varity, recognized that (a)(3) acts ". . . as a safety net, offering appropriate equitable relief for  
 9 injuries caused by violations that [29 U.S.C. § 1132] does not elsewhere [such as under (a)(1)(B) or  
 10 (a)(2)] adequately remedy." Id. at \*44-45. "Compensatory damages are not a form of equitable relief  
 11 available under 29 U.S.C. § 1132(a)(3)" (citing Mertens v. Hewitt Assocs., 508 U.S. 248, 113 S. Ct.  
 12 2063, 124 L. Ed. 2d 161 (1993)) and that "an estoppel claim cannot result in a payment of benefits  
 13 inconsistent with the written plan" and that in any event, "such claims" are covered under (a)(1)(B) as  
 14 claims for benefits. Again, Plaintiff has not sued under (a)(3) to compel the payment of benefits. That  
 15 claim is Plaintiff's (a)(1)(B) claim.

16 As Defendant has argued in the instant motion, the Aikens defendants relied upon Ford v. MCI  
 17 Communs Corp. Health & Welfare Plan, 399 F.3d 1076, 1083 (9th Cir. 2005), arguing that a plaintiff  
 18 who asserts specific claims under 29 U.S.C. §§ 1132(a)(1)(B) or (a)(2) cannot obtain relief under 29  
 19 U.S.C. § 1132(a)(3). The court in Aikens rejected defendant's reasoning. It explained:

20 [A] close read of Ford shows that the Court first dismissed the plaintiff's  
 21 claims against a defendant as a claims administrator or fiduciary before  
 22 dismissing the "catch-all" claim and, thus, the lawsuit against that  
 defendant. The decision states:

23 Ford failed to raise a material question of fact regarding Hartford's  
 24 liability under ERISA, either as a claims administrator or a  
 25 fiduciary. Because specific claims were asserted [and dismissed]  
 26 under discrete ERISA provisions, the 'catchall' provision is not  
 available as a source of relief.

27 28 Id. at 1083.  
 In the instant case, Plaintiffs seek relief under 29 U.S.C. § 1132(a)(3) that  
 is unavailable under either 29 U.S.C. §§ 1132(a)(1)(B) and (a)(2). Pursuant  
 to 29 U.S.C. § 1132(a)(3), Plaintiffs [\*47] seek the following equitable

1 relief: . . . (b) a declaration of breach of fiduciary duties; . . . and (e) an  
 2 injunction against Leagjeld, Kampshoff, and Smith from committing  
 3 further ERISA violations. . . . Such equitable relief is not available under  
 4 29 U.S.C. § 1132(a)(1)(B), which applies to benefits due under a plan, nor  
 is such relief available under 29 U.S.C. § 1132(a)(2), which inures to the  
 benefit of the plan. Therefore, Plaintiffs' claims pursuant to 29 U.S.C. §  
 1132(a)(3) are appropriate.

5 *Id.*

6 In Cyr v. Reliance Std. Life Ins. Co., 525 F. Supp. 2d 1165, 2007 U.S. Dist. LEXIS 87597 (C.D.  
 7 Cal. 2007), the plaintiff sued under ERISA seeking additional LTD benefits based on an adjusted salary  
 8 and declaratory relief clarifying her rights to future benefits against her former employer Channel  
 9 Technologies, Inc. ("CTI") and CTI's insurer, Reliance Standard Life Insurance Company ("RSL"). Cyr  
 10 also alleged equitable estoppel against RSL and CTI and breach of fiduciary duty against RSL. The Court  
 11 had dismissed RSL as a defendant to the (a)(1)(B) claim on June 8, 2007, on the ground that it was not  
 12 a proper defendant under ERISA, but later overturned that finding on reconsideration, finding "that RSL  
 13 is in fact a proper defendant to this cause of action."

14  
 15 Cyr argues that because "RSL admits that it performed virtually all, if not  
 16 all, of the services that a plan administrator performs," it functions as a  
 17 plan administrator and thus, under Everhart, is a proper defendant. (Cyr  
 Proper Party Mot. 9.) The Court agrees.

18 . . .

19 Further, the Ninth Circuit's decision in Everhart left room for suits against  
 20 insurers so long as they are functioning as the plan administrator. See  
 21 Everhart, 275 F.3d at 756 (holding that § 1132(a)(1)(B) does not permit  
 22 suits against insurers who are not "functioning as the plan administrator"  
 23 but not explaining how to decide when an insurer is so functioning). Cyr  
 24 notes that RSL "provided plan documents to participants, received benefit  
 25 claims, evaluated them and made benefit determinations, interpreted the  
 26 terms of the plan, and made and administered benefit payments." . . . RSL  
 27 does not contest these assertions; indeed, this entire case revolves around  
 28 the fact that RSL is claiming the right to interpret the plan, and is urging  
 an interpretation of the plan that would preclude Cyr's claims.

29  
 30 [\*1173] Instead, Defendant argues that Ford v. MCI Communs. Corp.  
 31 Health & Welfare Plan, 399 F.3d 1076 (9th Cir. 2005), forecloses Cyr's  
 32 argument that RSL is a proper defendant. In Ford, the court considered an  
 33 ERISA case for benefits in which the benefits plan had designated  
 34 Hartford Insurance/Hartford Life as the claims administrator but not as the  
 35 plan administrator. The court rejected the plaintiff's argument that  
 36 Hartford could be sued under 1132(a)(1)(B) because it "is the plan  
 37 administrator because it had discretionary authority to determine eligibility

1 for benefits and was functioning as the plan administrator." Id. at 1081-82.

2 Ford is distinguishable. First, any comments the Ninth Circuit made about  
 3 the propriety of suing insurers under § 1132(a)(1)(B) were dicta because  
 4 the decision is not clear about 13 [sic] whether Hartford was the insurer,  
 5 as opposed to merely the claims administrator. More importantly, [\*\*19]  
 6 in Ford the plan in fact designated a plan administrator - MCI. Here, the  
 7 parties agreed at the November 5, 2007 hearing on these motions that as  
 8 of 2000 -- the time of "the facts giving rise to the claim" -- all of the plan  
 9 documents were "silent concerning who the plan administrator [was]." . . .  
 . This lack of clarity is confirmed by the fact that during the administrative  
 10 appeal, Cyr's attorney opined to RSL that he could not "determine from the  
 11 subject Long Term Disability Policy issued by RSL whether RSL is the  
 12 plan administrator or whether Channel Technologies, Inc. is the plan  
 13 administrator."  
 14 . . .

15 These distinctions are important. In Ford, even if Hartford had a great deal  
 16 of control and decision making authority, MCI was the ultimate  
 17 administrator of the benefit plan. Further, there is no indication that  
 18 Hartford was responsible for funding any benefits due. The buck stopped,  
 19 so to speak, with MCI. It therefore made sense to limit liability to MCI  
 20 because it held ultimate responsibility, and presumably bore the ultimate  
 21 responsibility for paying out the benefits. Hartford, for all its  
 22 responsibility, in the end was in some way subordinate to MCI.

23 Ford may have precluded suits against entities who have been delegated  
 24 "discretionary authority," but it says nothing about cases where the entity  
 25 in question holds ultimate authority on all matters relating to plan benefits.  
 26 Reading Ford to prohibit suits against an entity with as broad authority as  
 27 RSL asserts here, simply because the plan fails to name any administrator,  
 28 leads to the anomalous conclusion that even if Cyr is entitled to her  
 29 benefits, she cannot sue the only entity who is ultimately responsible  
 30 [\*\*22] for providing them. 7 Such a ruling would allow an end run around  
 31 ERISA's statutory purpose of protecting employee benefits. See Black &  
Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S. Ct. 1965, 155  
 L. Ed. 2d 1034 (2003).

32 **FOOTNOTES**

33 7 This conclusion is buttressed by Federal Rule of Civil Procedure 19's  
 34 directive that a person or entity should be joined as a party if, inter alia,  
 35 "in the person's absence complete relief cannot be accorded among those  
 36 already parties." Fed. R. Civ. P. 19(a)(1).

37 Cyr, at 1173-1174. The court in Cyr found that another recent decision from the Northern District of  
 38 California supported its conclusion (citing Moody v. Liberty Life Assur. Co., 2007 U.S. Dist. LEXIS  
 39 32837, 2007 WL 1174828 (N.D. Cal. Apr. 19, 2007)). The court noted that,

1       In Moody [ ], the court granted the plaintiff leave to amend a §  
 2       1132(a)(1)(B) claim against the third party insurer with additional  
 3       allegations and evidence showing that the insurer was in fact functioning  
 4       as plan administrator. The court noted that under some "factual  
 5       circumstances [the insurer] could be considered 'co-plan administrators.'"  
 6       2007 U.S. Dist. LEXIS 32837, [WL] at \*4. In other words, the court did  
 7       not read Ford as precluding the acknowledgment of *de facto* plan  
 8       administrators in every situation.  
 9

10      Here, however, Dr. Kimberly has alleged Hartford was the Plan's claim fiduciary, a fiduciary  
 11     under ERISA, and acted as one of the Plan's plan administrators as reflected by its duties and the  
 12     commands of the claim regulations. 29 C.F.R. 2560.503-1 and subsections. By the terms of the new  
 13     regulations, since Hartford assumed all of the functions of the "Plan Administrator" (29 C.F.R. 2560.503-  
 14     1(a)-(j) (2002)), it is undisputedly a "Plan Administrator" of the LTD Plan for purposes of the benefits  
 15     denial and claim termination and this lawsuit. Hartford did everything; it decided everything. And it  
 16     decided not to pay. And it kept the benefits it would have had to pay had it not terminated Plaintiff's  
 17     claim. (This also would have allowed Hartford to release the reserves it kept on hand to pay the life of  
 18     the claim). It is Hartford that funds the benefits.

19      The Ford case involved a claim that predated the new regulations. The Ninth Circuit in Ford did  
 20     not address the change in the regulations. The regulations at the time of the Ford claim speak in terms  
 21     of the decision maker being a named plan "fiduciary"<sup>8</sup>)

22      The new regulations reflect that the Secretary considers the functions described in the regulations  
 23

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24      <sup>8</sup>The former regulations 29 C.F.R. 2560.503-1(a) - (i) (1999) merely state that if an insurance  
 25     company makes the decision on appeal of a denial, it is the "appropriate named fiduciary" for  
 26     conducting the final review. **29 C.F.R. § 2560.503-1**

27      **"(f) Content of [initial] notice"** "A plan administrator, or, ...insurance company . . . shall provide to  
 28     every claimant who is denied a claim for benefits written notice setting forth . . .";  
 29      **"(g)(2)** To the extent that benefits under an employee benefit plan are provided or administered *by an*  
 30     *insurance company, insurance service, or other similar organization* which is subject to regulation  
 31     under the insurance laws of one or more States, the claims procedure pertaining to such benefits may  
 32     provide for review of and decision upon denied claims by such company, service or organization. In  
 33     such case, that company, service, or organization shall be the "appropriate named fiduciary" for  
 34     purposes of this section.; " (ital/underline added);

35      **"(h) Decision on review.** (1)(i) A decision by an *appropriate named fiduciary* shall be made  
 36     promptly, . . ."

1 as being carried out by a “plan administrator.” The words, “or insurance company” were removed.<sup>9</sup>

2 Moreover, the Ninth Circuit in Ford took the position that the fiduciary duties under ERISA §  
 3 404(a) do not apply to insurer plan administrators or claims administrators. The Supreme Court  
 4 disagrees. It very recently put that issue to rest, emphasizing *that MetLife* (which was the named  
 5 defendant, the insurer, claim decision maker and payor, and the petitioner to the Supreme Court), *was*  
 6 *indeed subject to the express fiduciary duties under ERISA, including but not limited 404(a)’s “solely*  
 7 *in the interest of and “exclusive purposes” duties.* Metropolitan Life Ins. Co. v. Glenn, 128 S. Ct. 2343,  
 8 2008 U.S. LEXIS 5030 \*17, 76 U.S.L.W. 4495, 21 Fla. L. Weekly Fed. S 393 (U.S. 2008) (June 19,  
 9 2008).<sup>10</sup> The Supreme Court also referred to the “plan administrator” interchangeably as that  
 10 administrator that conducted the claim investigation and decision making. *Id.* at \*15-16 (stating, “The  
 11 answer to the conflict question is less clear where (as here) the plan administrator is not the employer  
 12 itself but rather a professional insurance company.”)<sup>11</sup> It certainly left room for the common occurrence

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14 <sup>9</sup> **29 C.F.R. 2560.503-1 (2002):** “(a) . . . the *plan administrator* shall notify the claimant, in  
 15 accordance with paragraph (g) of this section, of the plan's adverse benefit determination . . .”;  
 16 **(f)(3) “Disability claims.** In the case of a claim for disability benefits, *the plan administrator* shall  
 17 notify the claimant, in accordance with paragraph (g) of this section, of the plan's adverse benefit  
 18 determination . . .”;

19 **“(g) Manner and content of notification of benefit determination.** (1) Except as provided in  
 20 paragraph (g)(2) of this section, *the plan administrator* shall provide a claimant with written . . .”  
 21 **“(i) Timing of notification of benefit determination on review.** (1) In general. (i) Except as provided  
 22 in paragraph . . . (i)(3) [disability claims] of this section, *the plan administrator* shall notify a  
 23 claimant in accordance with paragraph (j) of this section of the plan's benefit determination on review  
 24 . . . If *the plan administrator* determines that an extension of time for processing is required, written  
 25 notice of the extension shall be furnished to the claimant . . .”

26 **“(j) Manner and content of notification of benefit determination on review.** The *plan*  
 27 *administrator* shall provide a claimant with written . . .” (Ital. Added).

28 <sup>10</sup> At \*3: “For one thing, the employer's own conflict may extend to its selection of an  
 29 insurance company to administer its plan. For another, ERISA imposes higher-than-marketplace  
 30 quality standards on insurers, requiring a plan administrator to “discharge [its] duties” in respect to  
 31 discretionary claims processing “solely in the interests of the [plan's] participants and beneficiaries,”  
 32 **29 U.S.C. § 1104(a)(1)**; underscoring the particular importance of accurate claims processing by  
 33 insisting that administrators “provide a 'full and fair review' of claim denials,” Firestone, *supra*, at  
 34 113, 109 S. Ct. 948, 103 L. Ed. 2d 80; and supplementing marketplace and regulatory controls with  
 35 judicial review of individual claim denials, see § 1132(a)(1)(B).”

36 <sup>11</sup> Metropolitan Life Insurance Company (MetLife) is an administrator and the insurer of  
 37 Sears, Roebuck & Company's long-term disability insurance plan, which is governed by [ERISA].  
 38 The plan gives MetLife (as administrator) discretionary authority to determine the validity of an  
 39 employee's benefits claim and provides that MetLife (as insurer) will pay the claims.”

1 under the new regulations —that of co-plan administrators — one being the employer plan sponsor and  
 2 one being a plan administrator subject to the requirements of the Secretary's regulations which are  
 3 expressly incorporated into ERISA § 503. No where did the Supreme Court intimate that MetLife was  
 4 not a proper party in an ERISA claim for benefits.

5 Finally, here, plan sponsor SRSMG was not involved in making any decisions to grant disability  
 6 or deny disability or to investigate the claim, or to pay benefits under the Plan. Hartford orchestrated and  
 7 arranged for all 'reviews' of the question of disability under the LTD Plan and communicated both the  
 8 initial and final denial letter. By the express terminology under the applicable Regulations for claims  
 9 filed after January 2001, as here, Hartford is a "plan administrator" of the Plan 29 C.F.R. 2560.503-1(a)-  
 10 (j). (see quoted sections at footnote 9 above).

11 This year, the Third Circuit held that even if an insured is entitled to full benefits under (a)(1)(B),  
 12 an employee can still sue a plan administrator as a fiduciary for failing to properly administer the claim.  
 13 Hahnemann Univ. Hosp. v. All Shore, Inc., 514 F.3d 300 (3rd Cir. 2008) (1/29/08).

14 Last month, the trial court in the Tenth Circuit, Galutza v. Hartford Life & Accident Ins. Co., 2008  
 15 U.S. Dist. LEXIS 45781 (N.D. Okla. June 12, 2008), rejected the same type of request by Hartford as  
 16 Defendant (through Hartford) advances here, and the court denied Hartford's motion for summary  
 17 judgment on the concurrent (a)(3) breach of fiduciary claim against Hartford. The court's reasoning in  
 18 Galutza is the same as in Black, supra, holding that 1) the Federal Rules of Civil Procedure allow a party  
 19 to "join two claims even though one of them is contingent on the disposition of the other . . ." Fed.R.Civ.P. 8(b); 2) procedurally it was too early to determine "as Varity requires -- whether 'no other  
 20 adequate ERISA relief is available' under § 1132(a)(1)(B)," and in fact would be unable to do so "until  
 21 after the parties brief their respective positions on the (a)(1)(B) claim, and this court determines whether  
 22 other adequate ERISA relief is available. As did the court in Black, the Tenth Circuit court in Galutza  
 23 looked to the Second Circuit's opinion in Devlin v. Empire Blue Cross and Blue Shield, 274 F.3d at 89  
 24 which not only held that Varity "did not eliminate a private cause of action for breach of fiduciary duty  
 25 when another potential remedy is available", permits joinder of "two possibly inconsistent claims"  
 26 (although an (a)(1)(B) and an (a)(3) claim or remedy are not necessarily inconsistent), but "permits the  
 27 grant of "appropriate equitable relief" in addition to other ERISA relief when a plaintiff succeeds on both  
 28

1 claims." The Galutza court stated it was not suggesting that a plaintiff should be permitted to obtain  
 2 relief against the same Defendant under both claims, but certainly concluded

3 "that Galutza ought to be permitted to join the two claims until such time  
 4 as it [\*9] may be determined whether § 1132(a)(1)(B) affords him  
 5 adequate relief. This "middle ground" would appear to be the proper  
 6 approach in cases where the plaintiff's allegations in the two claims appear  
 7 to differ, and where the plaintiff does not seek the same relief under both  
 8 claims."

9 . . .  
 10 The approach suggested by Hartford -- to disallow Galutza's claim for  
 11 equitable relief under § 1132(a)(3) where other ERISA relief is potentially  
 12 available to him -- would not only deprive a plaintiff of the right to plead  
 13 alternative and inconsistent claims for relief, it would mandate the  
 14 premature dismissal of a claim for equitable relief even in the rare case  
 15 where it later becomes clear that no other adequate ERISA relief is  
 16 available. 5 This may be such a case, as Galutza's [\*11] breach of  
 17 fiduciary duty claim appears to contain different substantive elements than  
 18 those which may be presented in the context of his (a)(1)(B) claim. For  
 19 instance, as noted in footnote 2 above, Galutza's counsel argues that a  
 20 fiduciary charged with acting in the interests of plan participants could  
 21 reasonably have been expected to tell Galutza that he could "withdraw" his  
 22 appeal until such time as he had obtained the deposition of the treating  
 23 physician, so long as the renewed appeal was presented within the original  
 24 180-day appeal period. The parties have not briefed the issue of whether  
 25 this argument may be presented within the context of Galutza's (a)(1)(B)  
 26 claim. If it cannot, a remedy for the alleged breach of that fiduciary duty  
 27 would be unavailable under (a)(1)(B), and hence legally inadequate under  
 28 Varsity. Until the issue is briefed and decided, the (a)(3) claim should  
 remain as an alternative, contingent claim.

18 Approximately three months ago, the Northern District of California expressly declined to dismiss  
 19 the breach of fiduciary claim against CNA Financial Corporation (a company acquired by Hartford, thus  
 20 making Hartford a party defending the suit. Caplan v. CNA Fin. Corp., 544 F. Supp. 2d 984, 2008 U.S.  
 21 Dist. LEXIS 28290 (N.D. Cal. 2008) (Apr. 4, 2008). In Caplan, Hartford was represented by the same  
 22 counsel representing Defendant in the present case. Based on (a presumably similar or same) briefing  
 23 by Mr. Rolstad in that case, the court nevertheless explained its refusal to preclude a concurrent (a)(1)(B)  
 24 and (a)(3) claim even up to summary judgment determination:

25 In a previous order denying Defendants' motion for summary judgment,  
 26 the Court declined to determine at that early juncture whether an award of  
 27 benefits under § 1132(a)(1)(B) would be an adequate remedy, or whether  
 28 the injunctive relief Plaintiff seeks is available. Now, on a fuller record, the  
 Court finds that § 1132(a)(1)(B) provides Plaintiff with an adequate  
 remedy. Plaintiff has not shown that he or other Plan participants stand to  
 face irreparable harm if injunctive relief is not granted; section

1 1132(a)(1)(B) will continue to provide all Plan participants, including  
 2 Plaintiff, with the opportunity to challenge Hartford's wrongful denial of  
 3 benefits.  
 4

5 In any [\*\*26] event, an injunction prohibiting Hartford from contracting  
 6 with UDC or removing Hartford as the Plan's administrator would not be  
 7 appropriate under the circumstances. Plaintiff has cited no case in which  
 8 a court has granted such far-reaching injunctive relief under circumstances  
 9 similar to those here.  
 10

11 It appears that Defendant's argument about the federal elements for injunctive relief that is raised  
 12 in the instant case tracks that which Defendant argued in Caplan. It would appear that this Court should  
 13 grant Dr. Kimberly leave to amend his First Amended Complaint to specifically name Hartford as a  
 14 defendant and seek relief under 502(a)(3) against Hartford itself instead of just seeking to bind any  
 15 fiduciary or administrator acting on behalf of or administering the Plan (including Hartford) to the relief  
 16 Ordered against the Plan. In contrast to the relief sought individually against Hartford in Caplan, Dr.  
 17 Kimberly has not requested that this Court prohibit the LTD Plan's claim fiduciary/plan administrator  
 18 (Hartford) from contracting with its frequently-utilized "University Disability Consortium" (UDC)  
 19 (utilized in both Caplan and the instant case and many many others<sup>12</sup>), or removing Hartford as the LTD  
 20

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21 <sup>12</sup>While Plaintiff understands that the following are a tiny sampling of cases in which Hartford  
 22 used UDC to effect a benefits denial or termination (since many undoubtedly never make it to court  
 23 and/or have no reported decision), this list reflects the joint efforts of the two entities in benefits  
 24 denials. Whitley v. Hartford Life & Accid. Ins. Co., 2008 U.S. App. LEXIS 1901 (4<sup>th</sup> Cir. Jan. 29,  
 25 2008); Caplan v. CNA Fin. Corp., 544 F. Supp. 2d 984, 2008 U.S. Dist. LEXIS 28290 (N.D. Cal.  
 26 2008); Hanusik v. Hartford Life Ins. Co., 2008 U.S. Dist LEXIS 7520 (E.D. Mich. Jan. 31, 2008);  
 27 Hicklin v. Hartford Life & Accident Ins. Co., 2007 U.S. Dist. LEXIS 96059 (C.D. Cal Dec. 2007);  
 28 Rabuck v. Hartford Life & Accid. Ins. Co., 2007 U.S. Dist LEXIS 80246 (W.D. Mich. 10/30/2007);  
Frei v. Hartford Life Ins. Co., 2006 WL 563051 (N.D. Cal. Mar 07, 2006); Dorholt v. Hartford Life  
and Acc. Ins. Co., 2006 WL 475280 (D. Minn. Feb 28, 2006); DeLorenzo v. Hartford Life and Acc.  
Ins. Co., 2006 WL 485119 (M.D. Fla. Feb 28 2006); Goldman v. Hartford Life and Acc. Ins. Co.,  
 29 417 F. Supp. 2d 788 (E.D. La. Feb 23, 2006); Baca-Flores v. Hartford Life and Acc. Ins. Co., 2006 WL  
 30 286868 (E.D. Mich. Feb 06, 2006); Work v. Hartford Life and Accident Ins. Co., 2005 WL 3071704  
 31 (E.D. Pa. Nov 15 2005); Wright v. R.R. Donnelly & Sons Co. Group Benefits Plan, 402 F.3d 67 (1st  
 32 Cir. 2005); Sollon v. Ohio Cas. Ins. Co., 396 F. Supp. 2d 560 (W.D. Pa. 2005); Krohmer-Burkett v.  
Hartford Life and Acc. Ins. Co., 2005 WL 2614503 (M.D. Fla. Oct 14, 2005); Lewis v. ITT Harford  
Life and Acc. Ins. Co., 295 F.Supp.2d 1053 (D. Kan. Oct 11, 2005); Lunsford v. Hartford Life & Acc.  
Ins. Co., 2005 WL 2088423 (S.D. W. Va. Aug 26, 2005); Collinsworth v. Hartford Life and Acc. Ins.  
Co., 2005 WL 1189841 (N.D. Tex. May 19, 2005); Corkill v. Hartford Life and Acc. Ins. Co., 2005  
 33 WL 1139915 (N.D. Fla. Apr 28, 2005); Cardin v. Hartford Life & Acc. Ins. Co., 366 F. Supp. 2d 692  
 34 (C.D. Ill. Apr 14, 2005); Matney v. Hartford Life Ins. Co., 2005 WL 578476 (N.D. Tex. Mar 10,  
 35 2005); Richards v. Hartford Life and Acc. Ins. Co., 356 F. Supp. 2d 1278 (S.D. Fla. Dec 01, 2004);  
McLeod v. Hartford Life and Acc. Ins. Co., 372 F.3d 618 (3d Cir. 2004); Hartranft v. Hartford Life  
and Acc. Ins. Co., 2004 WL 2377228 (D. Conn. Sep 30, 2004); Tripp v. Hartford Life and Acc. Ins.  
Co., 337 F. Supp. 2d 196 (D. Me. Sep 17, 2004); Barchus v. Hartford Life and Acc. Ins. Co., 320 F.  
 36 Supp. 2d 1266 (M.D. Fla. May 04, 2004); Kazazian v. Finlay Fine Jewelry Corp., 2003 WL  
 37 22594439 (D. Mass. Nov 10, 2003).

1 Plan's claim administrator/claim fiduciary/plan fiduciary/plan administrator under 20 CFR 2560.503-1.  
 2 Dr. Kimberly has never been provided with the documents and file materials in UDC's possession,  
 3 because Hartford never bothered to obtain them to make them part of the "administrative record" even  
 4 though Hartford specifically utilized UDC as its agent in assisting administration of the claim during the  
 5 appeal process, which Plaintiff contends makes those records part of the administrative record and  
 6 certainly records which meet the definition in the regulations, 29 C.F.R. 2560.503-1(m), a copy of which  
 7 Plaintiff is entitled to receive.

8       B.     THIS COURT SHOULD NOT STRIKE OR DISMISS PLAINTIFF'S PRAYER  
 9               FOR INJUNCTIVE RELIEF, AND IF NECESSARY IN ORDER TO  
 10               SPECIFICALLY ENJOIN HARTFORD FROM FURTHER FIDUCIARY  
 11               BREACHES, SHOULD GRANT PLAINTIFF LEAVE TO AMEND

12       With respect to a permanent injunction, Defendant has the wrong model. Defendant argues that  
 13 Plaintiff cannot satisfy the elements to obtain an injunction 1) regarding the (truncated) content of the so  
 14 called "administrative record" [and Hartford's refusal to allow Plaintiff the opportunity to address the  
 15 new evidence Hartford commissioned and obtained following the claimant's only appeal, prior to  
 16 Hartford conducting its own final review and issuance of a final adverse decision]. Plaintiff submits that  
 17 the latter is a favorite tactic of Hartford, and has been for some years, despite being specifically told by  
 18 the Secretary of Labor in an amicus brief to this Court, participating in the case of Russo v. Hartford, that  
 19 Hartford violated its fiduciary duties in so doing. The Court, through the Honorable Leo S. Papas, thus  
 20 held that Hartford had breached its fiduciary duties in that regard, which would permit the plaintiff, Mr.  
 21 Russo, to supplement the record with additional evidence that was responsive to the evidence Hartford  
 22 had blocked Plaintiff from reviewing or responding to. Russo v. Hartford Life & Accident Ins. Co., 2002  
 23 U.S. Dist. LEXIS 26566 (S.D. Cal. Feb. 5, 2002) (Held: Hartford breached its fiduciary duty by failing  
 24 to disclose, after Plaintiff's requests to disclose, new opinions on which insurer relied in its final denial  
 25 of the claim, which resulted in a review that was neither full nor fair under ERISA). Today, the one-sided  
 26 record resulting from Hartford's self-interested tactic can be remedied by the district court permitting the  
 27 affected claimant to supplement the record that is before the Court, and the court will review the record  
 28 together with the new responsive information de novo. (Abatie; Saffon, below). A true and correct  
 copy of the Secretary's amicus brief submitted in the Russo case, which sets forth the Secretary's position

1 about Hartford's improper maneuvers, is attached as Exhibit A to Plaintiff's Request for Judicial Notice  
 2 concurrently filed herewith.

3 As referenced above, the Ninth Circuit more recently has held that the same type of maneuver is  
 4 improper and is grounds for the Court, even under an abuse of discretion standard of review, to allow the  
 5 claimant to respond to the post-appeal evidence Hartford caused to be generated, and that the Court will  
 6 thus necessarily review such evidence *de novo*. Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955 (9th  
 7 Cir. Cal. 2006) *en banc*; Saffon v. Wells Fargo & Co. Long Term Disability Plan, 522 F.3d 863, 2008  
 8 U.S. App. LEXIS 8136 (9th Cir. Cal. 2008) (as amended 4/16/08).<sup>13</sup> Essentially 'thumping its nose' at  
 9 the Secretary's position she stated in her amicus brief, directly addressing Hartford's approach, Hartford  
 10 has continued to employ the same tactics, not only commissioning in Dr. Kimberly's case, after his  
 11 appeal, a 27-page report by a paper reviewer who never saw, spoke to, interviewed, examined or tested  
 12 Plaintiff, and *despite Plaintiff's numerous request to see and respond to the new opinions or evidence*  
 13 *before Hartford conducted its own final review*, then issued a shot-gun "final" denial letter within several  
 14 days of the new report without any opportunity for Plaintiff to review or respond to that paper-review  
 15 report and another shorter paper-review report. Plaintiff believes that Hartford purposefully employed  
 16 that tactic and will argue that the Court is limited to the so-called "Administrative Record" which  
 17 Hartford will argue 'closed' with its new reports and immediate "final" denial.

18 Plaintiff will present evidence showing that Hartford engages in this self-interested tactic  
 19 frequently. These are not the actions of a plan administrator, adhering to the

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20       <sup>13</sup>See also, Clark v. Qwest Disability Plan, 2008 U.S. Dist. LEXIS 28398, \*2 (W.D. Wash.  
 21 Apr. 8, 2008) following Abatie and Saffon:

22       "However, as the Court indicated at oral argument, remand was not a foregone conclusion.  
 23 Indeed, upon further consideration, the Court has concluded that the case should not be remanded  
 24 to the Plan Administrator. See Saffon v. Wells Fargo & Co. Long Term Disability Plan, 511 F.3d  
 1206, 1217 (9th Cir. 2008) [1/9/08; later amended] (parties allowed to present additional evidence  
 "in the district court"); Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955, 973 (9th Cir. 2006)  
 (8/16/06) ("the court may take additional evidence when [procedural] irregularities have prevented  
 full development of the administrative record").

25       The Court will therefore conduct a one-day bench trial on the administrative record. No live  
 26 testimony will be presented; 1 however, at her discretion, Plaintiff may supplement the record  
 27 with written evidence tending to rebut the Reed Review Services and Genex, Inc. reports (which  
 28 she saw for the first time on denial of her administrative appeal). . . .

FOOTNOTES

1 Taking additional evidence allows the Court to "recreate what the administrative record  
 2 would have been had the procedure been correct." Abatie, 458 F.3d at 973. In line with this  
 3 goal, any additional evidence should be submitted to the Court in written form.

1       “special standard of care [imposed] upon a plan administrator, namely, that  
 2       the administrator “discharge [its] duties” in respect to discretionary claims  
 3       processing “solely in the interests of the participants and beneficiaries” of  
 4       the plan, § 1104(a)(1); it simultaneously underscores the particular  
importance of accurate claims processing by insisting that administrators  
“provide a ‘full and fair review’ of claim denials,” Firestone, 489 U.S., at  
 113, 109 S. Ct. 948, 103 L. Ed. 2d 80 (quoting § 1133(2)).”

5       Metropolitan Life Ins. Co. V. Glenn, 128 S. Ct. 2343; 2008 U.S. LEXIS 5030, \*17; 76 U.S.L.W. 4495;  
 6       21 Fla. L. Weekly Fed. S 393 (June 19, 2008).<sup>14</sup>

7       Such continued breaches of fiduciary duty by an insurance company fiduciary, when Plaintiff  
 8       pursues his claim under a statute that provides for findings of breach of fiduciary duty and injunctive  
 9       relief, warrant permanent injunctive relief without the need to show a threat of irreparable or repeat  
 10       injuries. Silver Sage Partners Ltd. v. City of Desert Hot Springs, 251 F.3d 814, 826-827 (9<sup>th</sup> Cir. 2001).

11       Silver Sage is not an ERISA case. Silver Sage, however, involved violations of a federal statute  
 12 (FSHA) under which the plaintiff sought an injunction against future violations of the statute. The Ninth  
 13 Circuit reversed the district court’s denial of injunctive relief grounded on the plaintiff’s alleged failure  
 14 to prove a “reasonable likelihood of future violations.” The Court held that if the district court found that  
 15 defendant had violated the particular federal statute at issue (in that case, the Civil Rights statute), and  
 16 that statute provided for injunctive relief for violations of the statute [as ERISA does], that future  
 17 violations should be “presumed”. Citing Ninth and Eleventh Circuit precedent, the Court held that

18       “[t]he standard requirements for equitable relief need not be satisfied when  
 19       an injunction is sought to prevent the violation of a federal statute which  
specifically provides for injunctive relief.”<sup>15</sup>

21       <sup>14</sup>Defendant argues that “the primary purpose of ERISA [is] “to provide a method for workers  
 22       and beneficiaries to resolve disputes over benefits inexpensively and expeditiously.” (Defendant’s  
 23       Memorandum at page 6:3-7). However, Defendant overstates its argument both expressly and  
 24       implicitly. The “*primary*” purpose is greater employee protection of benefits.. Schikore v.  
BankAmerica Supplemental SI (MEJ) Retirement Plan, 269 F.3d 956, 962-63 (9<sup>th</sup> Cir. 2001) (“ The  
 25       purpose of ERISA is to protect the rights of employees in their benefit plans. 29 U.S.C.S. § 1001(b)”;  
 26       “ . . . the **purposes of ERISA, the central purpose of which is to protect the interests of**  
participants in employee benefit plans and their beneficiaries. 29 U.S.C.S. § 1001(b).”). See also,  
Glenn, *supra*, 2008 U.S. LEXIS 5030 at \*15, noting: “Congress’ desire to offer employees enhanced  
protection for their benefits.” Varity, *supra*, at 497, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (discussing  
 “competing congressional purposes” in enacting ERISA). ”

27       <sup>15</sup> “After the end of the second trial, plaintiffs requested an injunction under § 3613(c)(1)  
 28       enjoining the city from further violation of the Fair Housing Act or, in the alternative, an  
 evidentiary hearing to determine the scope of necessary remedial measures. n16 The district court  
 held that to obtain injunctive relief, plaintiffs “must show reasonable likelihood of future

1 Id. At 827. See also, Burlington N.R.R. Co. v. Dep't of Revenue, 934 F.2d 1064, 1074 (9th Cir. 1991)  
 2 (“The standard requirements for equitable relief need not be satisfied when an injunction is sought to  
 3 prevent the violation of a federal statute which specifically provides for injunctive relief”); Gresham v.  
 4 Windrush Partners, Ltd., 730 F.2d 1417, 1423 (11th Cir. 1984) (“irreparable injury may be presumed  
 5 from the fact of discrimination and violation of fair housing statutes”); Bedrossian v. Northwestern  
 6 Memorial Hosp., 409 F.3d 840, 843 (7th Cir. 2005) (“if a statute confers a right to an injunction once a  
 7 certain showing is made, no plaintiff... need show more than the statute specifies.”); O'Sullivan v. City  
 8 of Chicago, 478 F. Supp. 2d 1034, 2043 (N.D. Ill. 2007)<sup>16</sup>.

9 Plaintiff's requests for injunctive relief to prevent future truncation of the record and future  
 10 concealment of pertinent evidence related to Plaintiff's claim, requiring that Defendant's administrators  
 11 and fiduciaries provide all such evidence to Plaintiff at a time he can still address it during an  
 12 'administrative' process and so as to obtain a full and fair review of all of the evidence and issues, is  
 13

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14 violations of the Fair Housing Acts." Finding that plaintiffs provided no evidence that the city  
 15 was reasonably likely to violate the Fair Housing Act in the future, the district court denied  
 16 plaintiff's motion.

17 ...  
 18 Plaintiffs argue that in holding that they must establish a reasonable likelihood that the city  
 19 would continue to violate the Fair Housing Act, the district court reversed the burden of  
 20 persuasion. They contend that since they have established that the city has violated the Fair  
 21 Housing Act, future violation should be presumed. Plaintiffs' argument has merit. We have held  
 22 that where a defendant has violated a civil rights statute, we will presume that the plaintiff has  
 23 suffered irreparable injury from the fact of the defendant's violation. Smallwood v. Nat'l Can Co.,  
 24 583 F.2d 419, 420 (9th Cir. 1978)[\*\*32] (discussing Title VII); see also Burlington N.R.R. Co. v.  
Dep't of Revenue, 934 F.2d 1064, 1074 (9th Cir. 1991) (**The standard requirements for**  
**equitable relief need not be satisfied when an injunction is sought to prevent the violation of**  
**a federal statute which specifically provides for injunctive relief.**" (internal quotation marks  
 25 and citation omitted)); Gresham v. Windrush Partners, Ltd., 730 F.2d 1417, 1423 (11th Cir.  
 26 1984) (stating that "irreparable injury may be presumed from the fact of discrimination and  
 27 violations of fair housing statutes")."

28 Id. At 826-827.

29 <sup>16</sup>O'Sullivan at 1043:

30 “In sum, compliance with the four-part [\*\*26] test generally applicable to requests for  
 31 injunctive relief is inapplicable in the context of cases such as this. Were the rule as contended  
 32 for by the City, Bruso v. United Airlines, Inc., supra at 7, could not have been decided as it  
 33 was. That is, the court would have employed the four-part test on which the City insists, rather  
 34 than conditioned relief simply on a showing that "the defendant's 'discriminatory conduct  
could possibly persist in the future."” (underline added).

1 alleged narrowly enough to prevent overbroad reaching by injunctive relief.<sup>17</sup> If the Court believes such  
 2 relief should be imposed generally on the LTD Plan due to the requirements in the Ninth Circuit to ensure  
 3 proper application of ERISA's requirement, then the Court can fashion that relief as "appropriate" and  
 4 as necessary. Plaintiff, however, is seeking to remedy the violations and harms arising out of the conduct  
 5 of an administrator of the Plan, which was undertaken by Hartford and its employees and agents, when  
 6 applied to his case. If, on the other hand, the Court believes such remedy must be applied not against  
 7 the Plan —so as to bind all of the fiduciaries and administrators of the Plan— but against the particular  
 8 insurance company that is alleged to have engaged in the ERISA violations (Hartford), Plaintiff should  
 9 be granted leave to amend his First Amended Complaint. Either way, Hartford cannot deny its acute  
 10 awareness of the allegations in the First Amended Complaint and that they directly involve Hartford's  
 11 actions, process, procedures, claim investigation and claim handling, noncompliance with ERISA. Since  
 12 SRSMG, the sponsor of the LTD Plan was not involved in the claim decision making or claim processing  
 13 and investigation and, Plaintiff believes, is not the entity defending Plaintiff's suit, Plaintiff anticipates  
 14 that Hartford will be advancing all of its positions and arguments in its own interest anyway.

15 **IV. CONCLUSION**

16 Plaintiff respectfully submits this Court should deny Defendant's motion at this early juncture,  
 17 inasmuch as this court would not be able to determine whether Plaintiff may obtain his benefits under  
 18 (a)(1)(B) but whether other equitable relief may be "appropriate" as the only remedy available to address  
 19 the alleged violations of the (fiduciary) administrator of the Plan, Hartford. At the least, Plaintiff should  
 20 be granted leave to amend to name Hartford as a Defendant under 502(a)(3) in the lawsuit.

21 **MILLER, MONSON, PESHEL, POLACEK & HOSHAW**

22 /s Susan L. Horner

23 Dated: July 3, 2008

24 By: \_\_\_\_\_  
 Susan L. Horner, Attorneys for Plaintiff, Kent E. Kimberly, MD

25 \S D:\WPServer\LIT\LITH-L\KIMBERLY MD\LIT\Pleadings\P's Opp to MTStrikeDismiss\_finl 7-3-08.wpd

26 <sup>17</sup>When fashioning an equitable remedy for civil rights violations, courts are guided by general  
 27 principles of equity, including "the principle limitation ... that the relief should be no broader and no  
 28 more burdensome than necessary to provide complete relief to the plaintiff." Baltimore  
 Neighborhoods, Inc. v. LOB, Inc., 92 F. Supp.2d, 456, 468 (D.Md. 2000), citing Milliken v. Bradley,  
 433 U.S. 267, 279-280, 53 L. Ed. 2d 745, 97 S. Ct. 2749 (1977); Lowery v. Circuit City Stores, Inc.,  
 158 F.3d 742, 766 (4th Cir. 1998), vacated on other grounds, 527 U.S. 1031 (1999).